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No. 07-1103

IN THE

Supreme Court of the United States

T-MOBILE USA, INC., VERISIGN, INC.,
JAMSTER INTERNATIONAL SARL,
Petitioners,

v.

CHARLES FORD, CAROL FOX DE STEFANO,
INDIVIDUALLY, AND ON BEHALF OF OTHER PERSONS
SIMILARLY SITUATED AND THE GENERAL PUBLIC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In their Petition, T-Mobile USA, Inc., VeriSign, Inc., and Jamster International Sarl (together, "petitioners") showed that the Ninth Circuit's refusal to enforce the terms of the parties' agreement to arbitrate individually conflicts with the Third Circuit's decision in *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), the decisions of three additional federal circuit courts, and this Court's decisions applying Section 2 of the Federal Arbitration Act ("FAA"). Pet. 3-5 & n.2. Petitioners further showed that this case presents a recurring issue of national importance that affects contracts benefiting countless consumers and businesses: whether state-law unconscionability principles may be employed to discriminate against and prevent the enforcement of the terms of agreements to arbitrate individually in cases involving claims by a consumer. *Id.* at 2-5, 11-12.

As petitioners previously explained, this case presents the same question as in *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), a case in which this Court has requested a response that is now due on April 25, 2008. Efficiency dictates that the petitions in both cases be considered together, and respondents have offered no reason why that course should not be followed. Moreover, because *Laster* involves a single set of claims, rather than the different theories of liability advanced against different defendants here (Opp. 3), *Laster* is a more suitable vehicle for addressing the fundamental issues that these cases present.

Respondents' brief in opposition does not seriously contest the significance of the questions presented in the petition. Instead, respondents seek to avoid

review through a number of insubstantial arguments. First, they mischaracterize the question presented here (Opp. 7-8), which involves a challenge to the Ninth Circuit's refusal to enforce individual arbitration as set forth in the parties' agreement and not its subsequent enforcement of a severance provision that only became relevant *after* the court below violated the FAA by striking down the parties' chosen arbitration procedures. Second, in arguing that there is no circuit conflict on the question presented here (*id.* at 9-11), respondents badly misconstrue *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007), ignore that the Ninth Circuit explicitly "declin[ed] . . . to follow" *Gay*, see *Lowden* v. *T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n.3 (9th Cir. 2008), and neither mention nor discuss the numerous other contrary circuit court decisions that hold that individual arbitration is appropriate for the effective resolution of claims by consumers. See Pet. 3-4 & n.2. Finally, in arguing that state law can preclude parties from choosing the procedures that will apply in arbitration (Opp. 8-9), respondents ignore that this Court has ruled that "the uniqueness of an agreement to arbitrate" may not be used as the basis for an unconscionability finding subverting arbitration. See *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). They also do not address that the Third Circuit, in *Gay*, applied *Perry* to hold that state law unconscionability principles could deny parties their federal right to enforce individual arbitration, which represents the heartland of alternative dispute resolution. *Gay*, 511 F.3d at 395.

In sum, the question presented raises an important issue that has generated a conflict among the federal circuits and warrants resolution by this Court. The petition for certiorari should be held pending the

Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

A. The "Question Presented" Properly Frames The Issues And Facts Of This Case.

Respondents lead with the argument that the "Question Presented" is not "applicable to the facts and circumstances of this action." Opp. 7-8. That claim is baseless.

Here, the parties agreed to arbitrate on an individual basis any disputes arising out of their contracts with petitioner T-Mobile. Pet. App. 30a. As this Court has explained, the FAA was enacted to ensure the enforcement of the procedures chosen by parties to resolve their disputes. *E.g.*, *Volt Info. Scis., Inc.* v. *Board of Trs.*, 489 U.S. 468, 479 (1989); 9 U.S.C. § 4. Indeed, a principal benefit of arbitration is that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Here, the district court and Ninth Circuit refused to enforce an essential term of the parties' arbitration clause—their agreement to arbitrate individually—on grounds that petitioners contend violate the FAA. See Pet. 4-5; see also Pet. for Certiorari at 25-29, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008). The question whether the Ninth Circuit violated the FAA when it refused to enforce individual arbitration is thus squarely presented in this case.

Indeed, the parties' inclusion of a severance provision in the event that individual arbitration were deemed unenforceable underscores the importance

that the parties attached to that aspect of their arbitration agreement. Petitioners do not challenge the lower courts' enforcement of the severance provision, but instead attack the antecedent determination that individual arbitration agreed to by the parties is not enforceable in accordance with their agreement's terms. See 9 U.S.C. § 4. This case squarely presents that issue, which, as shown below, implicates a substantial conflict among the federal courts of appeals.

B. The Decision Below Conflicts With Rulings By Numerous Other Courts.

Respondents' argument (Opp. 9-11), that there is no conflict among the federal courts is based upon (i) a misreading of the Third Circuit's decision in *Gay*, and (ii) a refusal to address multiple decisions of other courts of appeals that uphold individual arbitration because it allows for the effective vindication of statutory rights in cases involving causes of action indistinguishable from those at issue here.

1. Respondents' discussion of the Third Circuit's ruling in *Gay* is not a fair reading of that decision. See Opp. 10. In *Gay*, the Third Circuit ruled that state-law decisions holding that agreements to resolve consumer claims by individual arbitration were unconscionable must give way to the FAA's federal mandate that such agreements be enforced. 511 F.3d at 394. That ruling did not turn on any claim that "the *statutes* upon which [plaintiff] based her claims required a judicial forum" or that "a specific statute provided her the right to assert her claims as a class action." Opp. 10 (emphasis in original). To the contrary, the Third Circuit explained that state unconscionability law was preempted by the FAA because the state decisions improperly "'rely on the uniqueness of an agreement to arbitrate as a

basis for a state-law holding that enforcement would be unconscionable.'" 511 F.3d at 394 (quoting *Perry*, 482 U.S. at 492 n.9).

That ruling by the Third Circuit is in conflict with the Ninth Circuit's rejection, in the ruling below, of the "argument that California [unconscionability] law is preempted by the [FAA]." Pet. App. 3a (following *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007)). And, although respondents assert that the Ninth Circuit's decision in *Lowden*, 512 F.3d at 1221, is distinguishable from *Gay*, they never attempt to explain how, Opp. 10-11, while they studiously avoid the Ninth Circuit's explicit choice not to "follow" *Gay*. 512 F.3d at 1221 n.3.

What respondents cannot avoid is that the *Gay* court considered and rejected the very argument that the court below accepted: that *state* unconscionability law could be employed as a basis for denying the parties' federal right under the FAA to arbitrate disputes individually. See *Gay*, 511 F.3d at 394 (quoting *Perry*, 482 U.S. at 492 n.9) The Third Circuit in *Gay* ruled that even though state law "cases are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." *Id.* at 395. As such, the Third Circuit ruling that Pennsylvania unconscionability law was preempted by the FAA is in conflict with the Ninth Circuit's decision in this case. See *id.* (following *Perry*, 482 U.S. at 492 n.9).[1]

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[1] Respondents likewise assert that *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008), does not conflict with *Gay*. Opp. 11. *Tillman* relied upon state policy to rule that a class waiver in an arbitration agreement was unenforceable.

2. In addition, respondents say nothing in response to petitioners' showing that the decision below conflicts with decisions from four separate circuits, which hold that individual arbitration allows for effective vindication of claims by consumers. Pet. 3-4 & n.2; see also Pet. for Certiorari at 11-25, *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008).

In contrast to the Ninth Circuit, four different circuits have upheld individual arbitration in cases involving small claims by consumers because individual arbitration allows for the effective vindication of statutory rights. See Pet. 4 n.2. (citing cases). For example, in *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000), then-Chief Judge Becker ruled that individual arbitration allowed for the effective vindication of substantive rights because it did "not eliminate plaintiff incentives to assert rights under the [Truth In Lending Act]." *Id.* at 374.

In *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), the Fourth Circuit likewise rejected a consumer's claim that an agreement to arbitrate individually was unconscionable on the alleged ground that "without the class action vehicle, [plaintiff] will be unable to maintain her legal representation given the small amount of her individual damages." *Id.* at 638. Instead, the court ruled that plaintiff's fears about the loss of her legal representation were unfounded because "'[a]ttorneys' fees'" were recoverable by a prevailing plaintiff in

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655 S.E.2d at 373. As the dissent noted, the majority failed to consider whether this Court's jurisprudence or the FAA preempted state law, *id.* at 386-87 (Newby, J., dissenting), and created a direct conflict between the majority's ruling and *Gay*, *id.* at 387.

arbitration. *Id.* at 638-39. *Accord Livingston* v. *Associates Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003).

And, in *Jenkins* v. *First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005), *cert. denied*, 546 U.S. 1214 (2006), the Eleventh Circuit held that the denial of a class-action mechanism was not unconscionable. *Id.* at 877-78. Instead, the court ruled that the availability of attorney's fees under the arbitration agreement provided plaintiffs with effective access to legal representation, and therefore "arbitration agreements prohibiting class action relief do not necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors." *Id.* at 878 (internal quotation marks omitted).

Here, of course, there is no dispute that respondents would be entitled to recover reasonable attorneys' fees and costs if they prevail on their underlying claims. Pet. App. 12a & n.4. Under the rulings in the Third, Fourth, Seventh, and Eleventh Circuits, individual arbitration should have been enforced as a matter of federal law because respondents would be able effectively to vindicate their statutory rights. Yet, because respondents brought their claim in California, the parties' agreement to arbitrate individually was deemed unconscionable by the Ninth Circuit, which has held that even when a party may recover reasonable attorneys' fees and costs, individual arbitration is nevertheless unenforceable. See *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986 (9th Cir. 2007).

In short, there is a plain and stark conflict between the decision below and decisions of other federal courts of appeals across the country.

C. The Decision Below Violates The FAA And Is Preempted.

Finally, respondents argue on the merits that application of the FAA to compel enforcement of the arbitration clause in this case would afford special treatment to contracts to arbitrate by precluding enforcement of generally-applicable contract law. Opp. 8-9. As shown above, respondents' arguments implicate issues that have generated conflicts among the lower courts and that warrant resolution by this Court. In all events, respondents' arguments should be rejected on the merits.

Section 2 of the FAA mandates the enforcement of agreements to arbitrate except upon grounds available for the "revocation of any contract." 9 U.S.C. § 2. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court reversed the California Supreme Court's refusal to enforce an agreement to arbitrate based on a state law that prohibited agreements to "'waive compliance with any provision'" of state franchise law. *Id.* at 10. This Court held that that provision of state franchise law was preempted because it was not "a ground that exists at law or in equity 'for the revocation of *any* contract.'" *Id.* at 16 n.11 (emphasis added by the Court) (quoting 9 U.S.C. § 2). That holding applies equally here because, on its face, the test crafted by the California Supreme Court and adopted by the Ninth Circuit below applies only to certain consumer contracts, and not "any contract," as required by Section 2 of the FAA. See Opp. 5. Moreover, respondents cannot avoid preemption by arguing that the decision below applied a court-made rule rather than a statute (Opp. 10), because the preemptive effect of the FAA does not depend on whether offending state law is "of legislative or judicial origin." *Perry*, 482 U.S. at 492 n.9.

Respondents further insist that the Ninth Circuit merely applied the generally applicable principle that California will not enforce contract provisions that serve to exculpate a party from liability. Opp. 5-6. Specifically, respondents rely upon the California Supreme Court's invocation of California Civil Code § 1668 to justify the decision not to enforce the arbitration agreement here. See *id.* at 5 (quoting *Discover Bank*, 113 P.3d at 1110).[2]

But California law is clear that, "[d]espite its broad language, section 1668 does not apply to every contract." *Vilner* v. *Crocker Nat'l Bank*, 89 Cal. App. 3d 732, 735 (1979). On the contrary, that principle applies only to the subset of contracts that involve the "public interest." *Tunkl* v. *Regents*, 383 P.2d 441 (Cal. 1963); see also *Cregg* v. *Ministor Ventures*, 148 Cal. App. 3d 1107, 1111 (1983) (same); 1 Witkin, *Summary of California Law* § 660, at 737-38 (10th ed. 2005) (same). Thus, § 1668, which underpins *Discover Bank* and the decision below, does not provide a basis for refusing to enforce an agreement to arbitrate individually because it is not a "ground[] as exist[s] in law or equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added).

Second, in any event, the suggestion that individual arbitration would "exculpate" petitioners from liability simply ignores the contrary decisions of multiple federal courts of appeals, which have held that individual arbitration allows consumers effectively to vindicate their statutory rights. As the Third Circuit

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[2] Section 1668 provides: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

has explained, even where the potential recovery is small, the prospect of recovering reasonable attorneys' fees ensures that such cases can be prosecuted effectively through individual arbitration. *Johnson*, 225 F.3d at 373.

The contrary conclusion adopted by the Ninth Circuit in *Shroyer*, *i.e.*, that the attorneys' fees that an arbitrator indisputably could award if respondents prevail on their substantive claims would be inadequate, hearkens back to the "longstanding judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. Indeed, such a view is out of step with this Court's decisions enforcing parties' agreement to arbitrate over the past 25 years, and cannot be reconciled with the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *cf. Gay*, 511 F.3d at 393 n.17 (noting that in consumer contracts generating small fees, businesses have "a legitimate reason to seek to avoid expensive litigation to resolve disputes with [their] customers and instead resolve [their] disputes less formally and probably less expensively in arbitration"). In all events, if there were any doubt on this issue, "the [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

This case, like *Laster*, presents the important and recurring issue of whether state unconscionability law can be employed in a manner that, in practice, applies only to arbitration agreements and which "could result in a significant narrowing of the application of the FAA." *Gay*, 511 F.3d at 395. What is at stake is nothing less than the ability of parties to agree to trade the costs, delay and complexity of

litigation for the "'simplicity, informality and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be held pending the Court's disposition of *T-Mobile USA, Inc.* v. *Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly.

Respectfully submitted,

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